

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

RONALD E. ZUBER,

Plaintiff,

vs.

APC NATCHIQ, INC.,

Defendant.

ORIGINAL

Case No. A03-0052 CV (RRB)

DEPOSITION OF MARK C. NELSON

APPEARANCES:

For the Plaintiff:

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For the Defendant:

Gregory L. Youngmun, Esq.
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Also Present:

Ronald E. Zuber

* * * * *

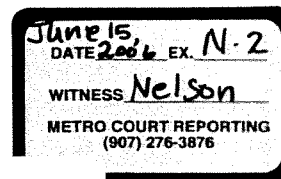
Pursuant to Notice, the Deposition of MARK C. NELSON was taken on behalf of the Plaintiff before Teresa E. Mielke, Notary Public in and for the State of Alaska and Reporter for Gemini Reporting Services, at the Offices of Gemini Reporting Services, 943 West Sixth Avenue, Suite 110, Anchorage, Alaska, on the 26th day of August, 2003, commencing at the hour of 1:50 p.m.

* * * * *

GEMINI

Reporting Services
943 West 6th, Suite 110
Anchorage, Alaska 99501
277-8501

EXHIBIT 4
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1 talking about today as president or are you talking about
2 when I was operations manager in Kuparuk?
3 Q For the time frame '96 forward, regardless of what your
4 job was, were there -- was there a person or a position
5 that the safety supervisors reported to, and that person
6 or job was the overall head of the safety department?
7 A For APC, no.
8 Q Okay, was it -- do you remember a Mr. Heffler or Heffley
9 or Heffer -- Heffner having a job like that?
10 A Keith Heffner, yes.
11 Q And did he have a job like that?
12 A Keith Heffner was -- I'm not sure what period of time he
13 was employed with the company, but I believe always with
14 the parent company Natchiq.
15 Q Okay, and what was his title, or is or was his title, if
16 you know?
17 A Somewhat -- something along the line of a corporate --
18 corporate HSE manager.
19 Q Okay, Mr. Buchanan called him the corporate safety guy, I
20 think, is that....
21 A Okay.
22 Qreasonable.....
23 A Sure.
24 Qname for him? All right, and prior to become AES was
25 Mr. Heffler -- Heffler, is that the right name? Heff.....

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1 A You're going to get me saying this now. Heffner.
2 Q Mr. Heffner in that same position as corporate safety guy?
3 A At the -- in which time frame?
4 Q Well, recently you changed from APC Natchiq to AES,
5 right.....
6 A Okay.
7 Qwithin a year or so?
8 A Today Keith Heffner is -- wait. Keith, yeah, today is not
9 our corporate safety man with AES. Today our corporate
10 safety man, 2003, is Doug Smith. So help me from there,
11 I'm not sure I under.....
12 Q All right, well, the -- we can go to either spot with
13 this. So Doug Smith is the corporate safety man. Today
14 do the specialists report to a safety supervisor and then
15 do the safety supervisors report to -- not exclusively but
16 to Mr. Smith?
17 A Do they have a channel of communication, a line of
18 reporting to the corporate safety man?
19 Q Yes.
20 A Sure.
21 Q Okay, and they might -- the safety supervisors might as
22 well -- might also report to operations manager at
23 Kuparuk, right?
24 A Yes.
25 Q All right. From the time frame in 1996 forward was there

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1 always a position, whether it be at Natchiq or APC, that
2 was comparable to Mr. Smith's and Mr. Heffner's job?
3 A With some gaps, maybe. I can't recall. Yeah.
4 Q Generally that would be the.....
5 A Company philosophy would have a corporate safety officer
6 or corporate safety man on the -- yes.
7 Q Okay, all right. Would it be reasonable to call that
8 position a corporate safety director or a safety director?
9 A I'm sure -- I don't know the distinction, director versus
10 manager versus officer but.....
11 Q I'm not trying to.....
12 Asenior -- senior safety resource to management, yes.
13 Q Okay, all right.
14 MR. COVELL: That's too early, isn't it?
15 MR. YOUNGMUN: It's 2:10.
16 MR. COVELL: Yes, it's too early.
17 Q Do you have -- or, when you were APC did you have a legal
18 department?
19 A What year?
20 Q 1996 forward.
21 A The -- I did not have access to a legal department in '96.
22 The legal in-house counsel we currently have today was
23 hired, I'm going to say, '99, 2000.
24 Q Okay, if -- prior to that time if you had need for legal
25 resource would the company obtain them for you?

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1 A We would've made a decision as to need and -- sure, of
2 course, right.
3 Q Okay. In 1996 you had occasion to -- or, did you have
4 occasion to evaluate various positions with APC for their
5 categorization as exempt or nonexempt for purposes of
6 overtime under state and federal law?
7 A I started '96, I think the time frame '97 is when I really
8 -- was really more -- did more of an evaluation.
9 Q Okay, and what precipitated you to do that, if you recall?
10 A Concerns that I had just in the -- in the media and
11 whatnot regarding exempt versus nonexempt.
12 Q Let me show you Exhibits 1 and 2 here, I represent to you
13 Exhibit 1 is what was supplied to us in discovery as a job
14 description for safety specialist, and Exhibit 2 is a job
15 announcement for a safety specialist job. Are you
16 familiar with Exhibit 1 there?
17 A Want me to read it, or.....
18 Q No, I'm just asking if that's.....
19 A I recognize the general outline, yes.
20 Q Okay. All right, do you recollect using that back in '96
21 or '97 in connection with evaluating whether or not a
22 safety specialist position was exempt or nonexempt?
23 A This particular job description?
24 Q Or one similar to it. This one -- we looked at these
25 earlier today, and we have potentially three of them.

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1 There's Exhibit 1, there's this job advertisement, I
 2 guess, and then there was.....
 3 MR. YOUNGMUN: 145.
 4 Q And this is -- I'm showing you Exhibit 4 that's designated
 5 APC 145. We came to the -- or, we came to the possible
 6 conclusion that this APC 145 is an older version of this
 7 Exhibit 1, and that they're apparently similar but there's
 8 some minor differences in them. And it's just to
 9 hopefully save us some time. In doing a review of the
 10 exempt status as a safety specialist did you use a job
 11 description -- this job description or one like it in
 12 doing a review, to your recollection?
 13 A It could have been a partial review that I did at the time
 14 by using this material.
 15 Q All right, can you take a minute, and we'll go off record
 16 if you need to, and read these and see if in your opinion
 17 these fairly describe the position of safety specialist
 18 with APC from 1996 to date?
 19 A Okay, you're -- you're asking me are these basically the
 20 same position evolving over the last.....
 21 Q Sure.
 22 AX years or something?
 23 Q Yes, yes.
 24 A Well, you want -- if you want me to read them verbatim I
 25 can. I can probably look at.....

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1 Q No, I.....
 2 Athem structurally and say they're probably the
 3 evaluation of -- you know, this was probably an old one,
 4 that's dated something last year, and this is probably
 5 this year. So, yeah, I would say it's probably an
 6 evaluation of time over -- without reading it verbatim.
 7 Q From '96 to date have there been any dramatic changes in
 8 the duties of the safety specialist?
 9 A In the day to day duties?
 10 Q Yes.
 11 A No.
 12 Q All right. Why don't you take a look at what's -- that's
 13 Exhibit 4, right? No, that's your copy, I have a copy
 14 right here. I just kind of -- In the course of evaluating
 15 the position was there some paperwork generated? When you
 16 examined the position of safety specialist and other
 17 positions concerning their exempt or nonexempt status was
 18 there some paperwork generated in that regard?
 19 A Yes.
 20 Q Okay, and -- okay. In Exhibit 4 I have these papers that
 21 were produced by your company to me, and I'd like to go
 22 through them with you and discuss them, so if you could
 23 turn to Page 137, which is the first page following the
 24 legal pleadings there.
 25 A This article?

Page 16

1 Q Yes.
 2 A Okay.
 3 Q Okay, is that article, which I understand to be a Forbes
 4 magazine article, what precipitated your interest in
 5 reviewing exempt versus nonexempt positions?
 6 A I think so, primarily.
 7 Q Looking at the second page of that in the next to last
 8 paragraph, about four lines down they talk about a case,
 9 Auer, A-U-E-R v. Robbins, do you see that right down in
 10 here?
 11 A Yes, um-hm.
 12 Q Okay, did you read that case?
 13 A No.
 14 Q Are you familiar with that case at all?
 15 A No.
 16 Q All right, and did you set some -- something in motion to
 17 track the progress of that case?
 18 A No.
 19 Q Looking at the next page, which is 139, this seems to be -
 20 - does this have much to do with the classification of
 21 exempt/nonexempt?
 22 A Doesn't appear to.
 23 MR. COVELL: Okay, do you want these, Greg? That's the
 24 other copy there, sure.
 25 Q Okay, let's go to the next page here. This is 140, this

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1 appears to be a memo from you to Anne Hippe and Toby
 2 Osborn, do you -- I guess is that what it is?
 3 A Yes.
 4 Q Do you recollect generating this.....
 5 A Yes.
 6 Qtoday?
 7 A It looks like one of mine.
 8 Q All right, and who's Anne Hippe and Toby Osborn?
 9 A Anne Hippe at the time was the comptroller, Toby Osborn
 10 was the CFO.
 11 Q Okay, and CFO is chief financial officer?
 12 A Yes.
 13 Q Okay, so these are money people, is that.....
 14 A Money people, yes.
 15 Q Okay, all right. And does that essentially say you're
 16 concerned about people being exempt or nonexempt and you
 17 wanted to look into that matter and explore it?
 18 A Right, at that time I was concerned and looking for -- I
 19 don't think I had much exposure at the time to exempt
 20 versus nonexempt and were looking for how do you classify,
 21 were we correct, were we not correct, looking for answers.
 22 Q Okay, and also in conjunction with looking at the exempt,
 23 nonexempt, did you also have a concern about whether or
 24 not paying people a daily salary was something you ought
 25 or ought not to be doing?

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1 A Is that what my memo says?
 2 Q Yes, I'd suggest to you that in these further papers.....
 3 A Suggest it? Sure, if that's what I was suggesting.
 4 Q Okay, all right. We already discussed -- let's go through
 5 these. 145 appearing to be the job description that more
 6 or less describes the job of safety specialist.
 7 A Oh, so, okay, project superintendent on 141.....
 8 Q Right.
 9 Aand engineers, super -- materials supervisors, 145,
 10 yes, safety specialists.
 11 Q Okay, and those pages you just went through before are
 12 other job descriptions for the company, is that right?
 13 A Yes.
 14 Q Did you review not only the safety specialists but those
 15 other job descriptions back in this time frame, '96, '97?
 16 A Yes.
 17 Q Okay, turning to 147, is that your handwriting?
 18 A Yes, it is.
 19 Q Okay, much better than mine, believe me. What's this
 20 paper represent, or what's it all about, if you can tell
 21 us?
 22 A I don't know all of what was going through my -- what was
 23 going through my mind at this time. There were -- there's
 24 a distinction in Alaska law between exempt/nonexempt,
 25 three categories. The ones that I would be concerned

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1 with, administrative, professional, executive. I believe
 2 it was -- in fact, I'm almost -- can almost remember the
 3 conversation with Randy Carr was around supervisors. I
 4 was unaware at the time supervisors was a whole separate
 5 classification and how it was classed in state law, but it
 6 was something that should be set aside and we -- something
 7 we should be concerned about, that you could classify them
 8 as exempt. But it's really exempt, they should be paid
 9 for all hours worked, but they could be paid at the
 10 straight time rate, and it was something I had never heard
 11 before. It was a note I made. This is some of those
 12 chicken scratches that I was making, maybe at the time I
 13 was even talking to him, for all I know. These are --
 14 these are -- these people listed below are maybe notes in
 15 my mind at the time of people that were paid exempt, could
 16 -- that could be -- maybe they were improperly -- I didn't
 17 know at the time, I was making notes to check them out. I
 18 suspect that's what it was.
 19 Q All right, and then turning to Pages -- well, as a group,
 20 148 through 157.
 21 A Okay.
 22 Q Can you tell us what those are, in general?
 23 A Yeah, they're some kind of a -- a test that you walk
 24 through and check whether they meet the criteria of exempt
 25 or nonexempt, basically.

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1 Q Did you want to call them a cheat sheet?
 2 A Yeah, I don't -- whatever you.....
 3 Q A checklist for.....
 4 Afor a layman, to --
 5 Qmore formal.....
 6 A Sure.
 7 Qsounding?
 8 A More or less, yeah.
 9 Q All right, do you know where these -- the blanks came
 10 from, as far as these checklists go?
 11 A Don't know today, yeah.
 12 Q All right, do you know if maybe you got them from -- well,
 13 never mind, okay. All right, do you know what 158 and 159
 14 are and why they might be included here as being relevant
 15 to this case?
 16 A 158?
 17 Q And 159.
 18 A One fifty -- They -- they are printouts, I'm not sure out
 19 of what system, if it was the data base we used at the
 20 time on the Slope. Appear to be employees who were paid
 21 on a day rate.
 22 Q Okay, do you know what was under the black-outs on those
 23 pages?
 24 A No.
 25 Q Do you know why the black-outs are there?

Page 21

1 A I don't recall. They may have been non -- nonexempt, I
 2 don't know.
 3 Q All right, and then Page 160, do you know why this is
 4 here? Might that be additional day rate people?
 5 A Additional people, right.
 6 Q All right. Looking at Page 161, that looks like that's
 7 perhaps an e-mail from you to Harvill/Price, and I believe
 8 we were told they were some type of managers, perhaps.
 9 Well, who are Harvill/Price?
 10 A Well, let me familiarize myself with this for a second
 11 here.
 12 Q Any time you want to do that, just say so, I don't mean to
 13 rush you.
 14 A Well, I can walk you through. Harvill and Price were
 15 super -- they were ARCO supervisors at the time, it was
 16 John Harvill, Mike Price, just used the last names. Bill
 17 Hurley at the time was -- was ARCO's HR manager in
 18 Anchorage. He may have been on the Slope periodically,
 19 but he was their HR manager. This would've been sent
 20 from, looks like Mike Price to Bill Hurley, the initial e-
 21 mail, asking the question -- well, it says, he writes,
 22 Mark Nelson is reviewing the APC positions, "he was
 23 curious as to how ARCO determined this. They would like
 24 to use our input as benchmarking information on" the
 25 issue. I -- I probably went to him at the time and said,

EXHIBIT A
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1 hey, how do you guys do it. You know, this is in December
 2 of '96, it was early on, I was -- I had concerns. I went
 3 to these guys and said what's the -- in fact, I think the
 4 article, the Forbes article, referenced a case against
 5 ARCO. I probably assumed at the time ARCO had -- was very
 6 fluent in this subject and could help me.
 7 Q Okay. I believe it does reference an article.
 8 A They in turn referred me to their compensation specialist
 9 or analyst here, Nancy Williams, gave me her number.
 10 Q Okay, did you ever talk to Nancy Williams?
 11 A Talked to somebody, don't recall the name.
 12 Q Concerning classification of positions as exempt or
 13 nonexempt?
 14 A Yes.
 15 Q Okay, do you recollect anything from the conversation?
 16 A Is that -- do you have a fax they sent me? It was in the
 17 file when I turned it over. Is that coming up here?
 18 Q I -- look at the next page.
 19 A Bingo. Okay, yes, I spoke with Nancy Williams, there is
 20 it. She -- I spoke with her about -- actually I was
 21 trying to get information about the case, she was not very
 22 forthcoming about the case, and she said something to the
 23 effect of we use a -- I don't know, I'll share with you
 24 some information, and she shared, I think, that fax right
 25 there it, basically.

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1 Q All right, and that's got a cover sheet, it says cover
 2 plus eight, so let's just count, one, two, three, four,
 3 five, six, seven, eight takes you through what's labeled
 4 APC.....
 5 A Yeah.
 6 Q170. So is it your recollection that those
 7 subsequent eight pages were the fax that you.....
 8 A Yeah.
 9 Qreceived from -- Okay, all right. So you had this
 10 conversation, she wasn't forthcoming about the case, but
 11 she said I'll share these materials with you and she sent
 12 those subsequent eight pages. Did the conversation --
 13 what else do you recollect about the conversation, if
 14 anything, or is that.....
 15 A She said they'd made changes in some of their positions,
 16 some of them they hadn't -- I don't really recall at the
 17 time. I -- I should say I recall at the time they were --
 18 there was an issue around engineers, field engineers, I
 19 don't remember how they ended up classifying -- I think
 20 that's what their suit -- the original suit was brought
 21 against. I may have asked, I think I did, about the
 22 supervisory people, how they were classifying maybe the --
 23 The positions I was concerned about at the time were
 24 warehouseman, safety specialist, engineers and whatnot,
 25 and I think that she told me, I'm going to say

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1 recollection is that she told me that they still
 2 classified safety as exempt, that they had maybe made
 3 changes in their engineering, but they weren't at liberty
 4 really to disclose too much information around that.
 5 Q Okay, is it fair to say, and correct me if I'm wrong
 6 because I'm not trying to testify here, that the
 7 conversation with her was somewhat guarded as to what they
 8 did or what they were doing?
 9 A Yes.
 10 Q Okay, and she said well, here is -- not to put this
 11 rudely, but she sort of said here is some materials, try
 12 to work it out with these?
 13 A Yeah, she -- and you're dating me, this is six or seven
 14 years ago, so I don't remember the verbatim conversation.
 15 It was something that, you know, we had the suit, we're
 16 not -- we don't want to talk about it. I think it had
 17 been settled out of court, I don't know that it was made
 18 public. She said, I'll -- you know, I could tell you some
 19 here -- but I don't think at the time it helped me, it's
 20 not -- I wasn't going to rely solely on her -- her
 21 opinions or what she told me to make a final judgment. So
 22 I -- it was just -- that was just early in the game.
 23 Q Step in the process?
 24 A Yes.
 25 Q Okay, all right. Let's go ahead and turn over to Page 171

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1 because it might be answering some of our questions.
 2 There appears to be an e-mail there from you to Chris
 3 Boyle, indicates you talked with Nancy Williams, she faxed
 4 you a guideline, refer you to Rose Garcia or LouAnn in
 5 their payroll. Do you remember talking to Rose or LouAnn
 6 in payroll?
 7 A Well, I -- I said here it was LouAnn I talked with, so I
 8 -- I must've. You know, I don't -- I don't really recall
 9 the conversation, though.
 10 Q Okay. Was it.....
 11 A If I read this -- if you want me to read this, it would --
 12 looks like one of my e-mails, so I can read it if you like
 13 and.....
 14 Q No, we've got it in the record I'm just as much trying to
 15 jog your memory as we have this -- we have this
 16 information essentially -- well, you're establishing it
 17 for us as your e-mail that was made contemporaneous with
 18 you going through this classification procedure. All
 19 right, and that second half of that first paragraph starts
 20 to address the day rate issue, as you can see. Does that
 21 refresh your recollection that that was a matter that was
 22 of concern to you, along with the exemption status?
 23 A Yes. Or partial. I think at the time my concern was as
 24 much partial payment of a day rate.
 25 Q Okay. Let's see here. What -- well, let's just put this

EXHIBIT A
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1 you to put it in writing because these guys do not believe
 2 that they don't fit the -- into the exempt category.
 3 Which subsequently came out this letter that he sent me.
 4 Q All right, but you -- in regard to safety specialists you
 5 don't recollect what you told Mr. Carr the safety
 6 specialists did?
 7 A Well, I would -- I would've describe their -- their day to
 8 day duties to Mr. Carr and had a conversation back and
 9 forth, which he offered the -- he actually offered a
 10 verbal opinion about every one. It was really only the
 11 warehousemen that I said, look, I got a problem here with
 12 the morale and the issue of my employees, I need you to
 13 put it in writing because they don't believe it.
 14 Q Let me draw your attention here to -- why don't we look at
 15 Page 163, we see the third or fourth paragraph, depending
 16 on what you do with the bullets, it says, "One of the more
 17 complex areas of", could you read that paragraph for us?
 18 A Want me to read it out loud?
 19 Q Yes, please.
 20 A "One of the more complex areas of the FLSA is its
 21 classification of certain employees as exempt or excluded
 22 from coverage by the overtime requirements of the law. An
 23 employee is presumed to be nonexempt", parentheses,
 24 "covered by the law and entitled to receive overtime pay",
 25 comma, "unless the employee (sic) can show that the

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1 employee's job duties and pay meet certain criteria".
 2 Q Did you review that material when you were doing this
 3 review back in '96, '97? Did you read this paper, 163?
 4 A I -- I'm sure I did, sure.
 5 Q Okay. And you -- and you did read the Forbes article,
 6 which is perhaps -- would you agree, to paraphrase it it
 7 sort of says this area is a quagmire? That a fair way to
 8 characterize that article?
 9 A Don't really recall, I haven't read it recently, but....
 10 Q Okay, well, it's kind of like a watch-out article, isn't
 11 it?
 12 A Oh, sure, that was my -- set my alarm bells off, yes.
 13 Q All right. And then I draw your attention to Page -- I
 14 think it's -- I've probably gone by it here -- 154 and
 15 155. Is that your handwriting on 154?
 16 A Yes.
 17 Q All right, and did you use this checklist to make your
 18 determination concerning -- or, what did you use this
 19 checklist for?
 20 A Checklist was the basis that I went through, I don't know
 21 that I ever truly completed it per se, it's not obviously
 22 formal by any means in the sense that I formalized it or
 23 signed it. It is my handwriting and I did use it to
 24 formulate the basis for classification of our employees.
 25 Q Okay, do you know if you filled this out when you were

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1 talking to Mr. Carr or if you did it at another time, if
 2 you know?
 3 A I don't recall, it was part of the file and it was
 4 something that would've been part of the overall
 5 determination.
 6 Q Okay, you checked off there under administrative test
 7 "performs office or nonmanual work directly related to
 8 management policies or general business operations", and
 9 you checked that. I take it that that means that you felt
 10 that a safety specialist does that, is that so?
 11 A Yes.
 12 Q All right, let me draw your attention to the other set of
 13 checklists, which is Page 166, and up towards the binding
 14 there there's some notations -- well, out here. Is that
 15 your handwriting on the right-hand side of that paper?
 16 A Yes.
 17 Q All right, and that says "directly related to management
 18 policies, this means to affect" with an A "these
 19 policies", slant, "change the".....
 20 A Change them.
 21 Q "Change them, not work with (sic) . . . policies", and
 22 that's to the right of an arrow that comes off of "primary
 23 duty is office or nonmanual work directly related to
 24 management policies or general business operations of the
 25 employer or" the "employer's customers". Do you recollect

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1 making that note?
 2 A It's my writing, so I -- I'm sure I did, yes.
 3 Q And do you know where you got that information from in the
 4 note?
 5 A I can't say verbatim, it -- it could have been from my
 6 discussions with Randy Carr. At the time I viewed him as
 7 the chief specialist, if you will, but I -- I can't say
 8 that.
 9 Q Okay, what duties does a safety specialist have that
 10 affects or changes policy?
 11 A What duties?
 12 Q What does a safety specialist do that fulfills that
 13 requirement as it was to be exempt?
 14 A You mean beyond the -- okay, you're at what does a safety
 15 specialist did that affects policy?
 16 Q Sure, affects policy, yeah.
 17 A Well, the safety specialist is one who -- who actually --
 18 in the oilfield a big piece of our work is safety, right?
 19 So it's a little bit hard to imagine, maybe, if you don't
 20 work, there's a policy for everything, especially back in
 21 '96 when -- when maybe this was going -- but in '96 we
 22 were very light on policy, if you will. Safety
 23 specialists at that time were -- were formulating,
 24 writing, coaching, everything to do with those -- those
 25 policies and procedures that were being formulated at the